

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

-----X
JOSEPH COOPER

Plaintiff,

VS.

Case 3:14-cv-04152-B D

BRODERICK STEVEN "STEVE" HARVEY

Defendant

-----X

**EXPERT REPORT OF
OF MICHAEL A. EINHORN, Ph.D.,**

ON BEHALF OF PLAINTIFF

July 10, 2015

Subject to change as additional information becomes available

1. INTRODUCTION

1.1)I have been asked by Plaintiff Joseph Cooper, by and through his attorney J. Michael Weston, for my professional valuation of damages that resulted from a breach of contract and tortious interference with business relations related to the actions of Steve Harvey.

1.2)Plaintiff Joseph Cooper is a video producer who taped and secured distribution rights for a collection of Steve Harvey comedy videos that were recorded in 1993-1994 at the Steve Harvey Comedy Club in Dallas, Texas. The comedy material is adult fare in language and subject matter. As used in this report, "adult fare" does not refer to anything that might be considered pornographic.

1.3)Defendant Steve Harvey is a prominent comedian who is now the host of the *Steve Harvey Morning Show* (reaching over sixty radio markets), the *Steve Harvey Talk Show* (on television in fifty states and the District of Columbia), and is the host of syndicated television shows *Family Feud* and *Celebrity Family Food*. Mr. Harvey is also an author whose books have been made into movies. Prior to his committing to a prime time audience, Mr. Harvey performed a number of adult comedy acts throughout the U.S. and released an adult DVD *Still Trippin'* in as late as 2008

1.4) Plaintiff contends that he entered with the Defendant a video contract under which the plaintiff videotaped about 120 hours of Mr. Harvey's nightclub routines, in anticipation of releases at some later time.

1.5) I am advised that Plaintiff has now a history of attempting to create products from the videotapes of Mr. Harvey that resulted in delays by Mr. Harvey. I am also advised that Plaintiff believes that Mr. Harvey agreed to pay \$5,000,000 for a buyout of Plaintiff's rights in the videos.

1.6) Plaintiff contends that Harvey interfered with the release of the first of five contracted videos in the year 2014 by inducing Music Video Distributors, Inc. to refuse to enter into a contract that Mr. Cooper had negotiated for the purpose of distributing to interested retailers the DVD volume *Live, Raw, & Uncensored*; four later sequels were planned. The DVDs were to be derived from videotaped performances of Steve Harvey at the Steve Harvey Comedy Club in Dallas.

1.7)I am advised that Mr. Harvey's actions are unlawful and have occurred largely because of his change in his professional image that had become more family-friendly.

1.8)I have been asked to estimate the damages suffered as a consequence of breaches of contract and unlawful interference with a proper business relationship.

1.9)I am not related to any party in this lawsuit, nor do I have any financial interest in this case other than my hourly fees. I am paid for my services in report-writing at a rate of \$400 per

hour, and for testifying at a rate of \$500 per hour. My compensation is not contingent upon the outcome of this case.

1.10) My assumptions, methodologies, and calculations are based on current knowledge and professional methods consistent with the standards of the economics profession.

2. STATEMENT OF QUALIFICATIONS

2.1) As an economist (Ph.D. Yale 1981), I have worked since 1997 in the area of media and intellectual property. My *curriculum vita* is attached hereto as Appendix A.

2.2) From 1997 to 2000, I worked as a staff economist at Broadcast Music, Inc. ("BMI"). BMI is a collecting agency that licenses performance rights in music to major broadcasters, including television networks, local stations, cable companies, and radio stations. Negotiating license fees for musical compositions generally involves some means of acknowledging the value of the intellectual property to the user. It also involves institutional knowledge of television, radio, movies, and cable programming.

2.3) From July 2000 to the present date, I have served as a testifying economist in court cases involving the valuation of the intellectual property owned by musicians, songwriters, music publishers, record labels, artists, photographers, actors, cartoonists, television producers, cable companies, and radio stations. A complete list of my testifying engagements is included in my attached *curriculum vitae*.

2.4) I have written 38 professional articles in the area of copyright and intellectual property in law journals and periodicals. I have delivered 36 professional lectures or CLE seminars related to these topics. I am also the author of the book *Media, Technology, and Copyright: Integrating Law and Economics* (Edward Elgar Publishers). I testified as an expert at deposition and/or trial on damages for copyright infringement in the cases of *Fitness Quest, Inc. v. Universal Music Publishing Group, Inc., et al.* (N. D. Ohio, 2004), *Bridgeport Music et al. v. Estate of Christopher Wallace, et al.* (M.D. Tenn., 2006), *Turino et al. v. Island Def Jam, et al.*, (C.D. Cal., 2006), *Bridgeport Music Inc. v. Smelzgood Entertainment, et al.* (M.D. Tenn., 2007), *TMTV Corp. v. Mass Productions, Inc.* (D.P.R., 2009), *Malibu Textiles v. Carol Anderson, Inc.* (S.D.N.Y, 2008), *Serendip LLC, et al. v. Franchise Pictures LLC, et al.*, (C.D. Cal., 2009), *Chris Lester v. U2, Apple Computer, and Universal Music* (C.D. Cal., 2009), *Kilter, Inc. v. Avon Corporation*, (S.D.N.Y., 2011), *Rafael Vergara Hermosilla v. The Coca Cola Company*, (S.D. Fl., 2011), *Dan Marino v. Usher, et al.*, (E.D. Pa., 2013), *Lessem v. Taylor*, (S.D.N.Y. 2012).

2.5) My analysis of copyright damages in *Bridgeport Music et al. v. Estate of Christopher Wallace, et al.*, was upheld on appeal by the Sixth Circuit Court of Appeals. Defendants did not challenge my expert analysis of damages in *Bridgeport Music Inc. v. Smelzgood Entertainment, et al.* in an appeal on other matters to the Sixth Circuit Court of Appeals. In no matter has my expert analysis ever been disqualified or limited by any court with regard to a matter of economic analysis.

3. SUMMARY OF CONCLUSIONS

As I believe that the distribution contract implicated a collection of five DVDs in total, I estimate that Mr. Cooper may have lost the opportunity to earn in the area of \$2,671.310

4. DOCUMENTS REVIEWED

Second Amended Complaint and Jury Demand, *Cooper v. Harvey*

Licensing and Distribution Agreement, Joseph Cooper and Movie Video Distribution, entered January 20, 2014

Wikipedia Article, *Steve Harvey*

5. LOST SALES RESULTING FROM BREACH OF CONTRACT AND TORTIOUS INTERFERENCE

5.1) As a matter of law, I am advised that Plaintiff is entitled to recovery of amounts that would have been earned had the contested DVD/BluRay been released per the 2014 distribution contract.

5.2) To do this analysis, it would be appropriate to calculate plaintiff earnings based on an estimated amount of DVD sales. It would be appropriate to determine this estimate from the sales records of DVDs from comparable comedy shows sold on DVD.

5.3) I am advised that at the time of this report, Mr. Harvey has not turned over any related information and documents that Plaintiff has requested.

5.4) It is then appropriate to determine expected sales based on comparable market benchmarks.

5.5) To determine a suitable list, I reviewed a number of candidate shows on which Steve Harvey appeared. The most practical choice was the video *Still Trippin'*, which Mr. Harvey released in the year 2008. The online store Amazon.com describes *Still Trippin'* as follows.

"Steve Harvey once again commands the stage in his 90 minute stand-up comedy concert I'm Still Trippin'. Harvey kept it clean and family friendly in his last comedy special Don't Trip: He Ain't Through With Me Yet. Not easy for one of the Original Kings of Comedy, but then Harvey's versatility is precisely why he's in a class of his own. In I'm Still Trippin' Harvey never misses a beat and no topic is off limits. Harvey takes you on a ride through his personal experiences as it pertains to his family, work and traveling. Filmed in New Jersey to a full house, his energy and comedic timing are second to none. This comedic performance is sure to become an instant classic." <http://www.ebay.com/itm/Steve-Harvey-Still-Trippin-2008-DVD-New-/291456752150>; <http://www.amazon.com/Steve-Harvey-Still-Trippin/dp/B001B73PQC>

5.6) On a five star scale, reviews of the DVD were generally favorable.

<u>5 star</u>	<u>54%</u>
<u>4 star</u>	<u>13%</u>
<u>3 star</u>	<u>8%</u>
<u>2 star</u>	<u>11%</u>
<u>1 star</u>	<u>14%</u>

The release averaged 3.8 out of 5 on Amazon.

5.7) Unlike much of Harvey's later work the material in *Still Trippin'* is adult-oriented charged with raw language, sexual innuendo, and racial fare. This is substantiated by some number of reader reviews that found the tape too hardcore.

9 of 10 people found the following review helpful

By [Denise D. Blanks](#) on October 15, 2010

I thought this video was "clean" like "Don't Trip..." I was wrong! Not into all the cussing stuff -those days are over for me. If you are thinking this video is like the first one, IT'S NOT! I gave it away!

7 of 8 people found the following review helpful

By [Pandoras' Box](#) on December 9, 2008

I was very disappointed with this dvd. I wish I wouldn't have spent my money on it. I almost fell asleep trying to watch this dvd. He only had 1 really funny joke. I listen to his show every morning driving to work. The majority of the jokes he has already said on his radio show. It did not tear my mouth out. I think that Mr. Harvey is a very talented guy, but this dvd did not do it for me and I was quite disappointed in it. He never did finish his last joke. It was a waste of my money. If you want to rent it and watch it or watch a friends dvd, then I would suggest you to do that before actually purchasing a copy for your self to keep.

2 of 2 people found the following review helpful

By [Jose Lopez](#) on April 21, 2011

Steve Harvey seems like a Nice and Intelligent person,kind of like Bill Cosby(Almost),He is not hilarious,especially in this long and at times boring stand up.I don't care if someone curses or not,I found the ghetto wedding bit funny and his talk about His sons wanting Dread Locks or tattoos etcera.However when he got political and his reasoning was he voted just to vote for someone skin's color made him as "Ig-Nant" as he says as the next person or more,I "Hope" He does not vote for the same mistake again based on one's skin,If it were about that I would have never voted for anyone who did not have my name or similar or skin tone.

1 of 1 people found the following review helpful
By [George T. McDonald](#) on June 3, 2013

I chose this because my husband likes Steve Harvey. This was from SH earlier days and was racially insensitive, so even my husband did not watch most of it.

1 of 1 people found the following review helpful
By [lildee](#) on October 16, 2012

The product quality was great, as for the DVD it's self just ok not really impressed with the contents. totally for adults that might enjoy 4 letter words.

1 of 1 people found the following review helpful
By [Lisa Marie](#) on May 15, 2013

Come on Steve. I was hoping for variety. You certainly don't need to be vulgar to be funny or entertaining.

1 of 1 people found the following review helpful
By [Kindle Customer](#) on February 20, 2013

The quality was very poor. I wanted to send it back but I had already opened and he wasn't funny either.

5.8) This adult material is very relevant to this case as Mr. Cooper's video material was similarly themed for adult audiences. As much of Harvey's other later releases are more family-friendly, it is then proper to advance *Still Trippin'* as the best possible benchmark for a comparable work that Mr. Cooper had attempted.

5.9) Sales totals for *Still Trippin'* were not immediately available from any public source. To estimate sales for the DVD, I directed Nash Information Services to provide a best estimate of this total.

5.10) In the course of its engagement, Nash used the Internet Archive (archive.org) to find historical Amazon sales ranks for the title. The website had ranks and pricing information for 21 dates, ranging from November 13, 2008 (shortly after the release of the title) to September 14, 2014. While Amazon may have stopped selling the title, *Still Trippin'* may still be available from some third-parties vendors.

5.11) For each sales rank on Amazon, Nash was able to determine some neighborhood items in the rankings for which daily sales were available. Based on this comparison, it was possible to

estimate the sales total for each date where a rank was available. Sales totals per day ranged from a high of 5.23 sales in December, 2008, to a low of 0.19 sales in September, 2014.

Date	Amazon Sales Rank	Daily Sales at Amazon.com
11/13/2008	551	3.97
12/4/2008	2157	4.02
12/12/2008	2143	4.30
12/16/2008	2079	5.23
12/21/2008	2274	3.97
12/24/2008	2361	1.73
2/2/2009	566	4.04
2/7/2009	712	3.44
2/15/2009	828	2.03
4/7/2009	2311	1.84
8/6/2009	4651	1.86
5/6/2010	7365	1.74
6/17/2012	9757	2.55
7/31/2012	7975	2.67
10/7/2012	16410	1.79
1/29/2013	22817	1.32
5/30/2013	28423	1.17
9/2/2013	10426	2.10
9/15/2013	21475	1.39
8/29/2014	60447	0.66
9/14/2014	84555	0.19

5.12) From very limited information, I estimated that Amazon accounts for 4.17% of sales of titles released by African American comedians. This estimate was drawn from information related to sales of Kevin Hart's *Laugh at My Pain*. Of total retail sales made of 208,324, Mr. Hart sold 8099 (or 3.9 percent) through Amazon.

5.13) By adjusting for Amazon's market share for these titles, I was able to derive an estimate for daily sales for *Still Trippin'* across the United States. For example, if Amazon is selling five units per day, then the nationwide total would be expected to be approximately 128.2 units per day across the U.S.

5.14) For intermediate dates where sales ranks were not available for the DVD, I calculated the daily nationwide sales estimates for the title by interpolating the daily sales from available endpoints on each interval.

5.15) I estimate that *Still Trippin'* sold 99,452 units since 2008. I shall use this amount as the benchmark total for prospective units that could have been sold for the first DVD in *Live, Raw, & Uncensored*.

6. DAMAGES FROM LOST ROYALTIES

6.1) Per the terms of the Distribution Agreement entered in January, 2014 between Joseph Cooper and Music Video Distributors, Inc., Mr. Cooper was to receive a royalty of 75 percent of all sales of distributed works; the royalty base was wholesale revenues less production costs incurred by MVD (at §3a).

6.2) I estimated revenues based on a wholesale price of \$8.25 per unit, which is specified in the Licensing and Distribution Agreement between Mr. Cooper and Music Video Distributors (at §3a). The unit expenses for a full color DVD release are \$0.62.¹ This leaves a net price of \$7.63 per unit.

6.3) Per the terms of the contract, MVD was permitted to deduct as a cost an amount of no more than \$1000 to recover costs of authoring and encoding (at §5). Less a \$1000 deduction, net profits from the sale of Mr. Cooper's first DVD are \$757,819.

6.4) At 75 percent, Mr. Cooper's share of this total is \$568,364.

6.5) The contract also specifies that various retailers may deduct certain charges without any prior written approval from MVD. Per the terms of the contract, these retail charges were to be deducted from royalty payments due Mr. Cooper.

6.6) While the eight specified charges are quite varied, two are fairly transparent. Amazon.com specifies a 7 percent deduction from ongoing purchases, while Best Buy specifies an amount no less than 5 percent. (at §6d) I shall use a percentage of 6 percent of sales for retail deductions chargeable from Mr. Cooper's.

6.7) The remaining net royalties due Mr. Cooper from missed sales of *Live, Raw, & Uncensored* are \$534,262.

6.8) As I believe that the distribution contract implicated in total a collection of five DVDs that were to be derived from Mr. Cooper's videotapes, I estimate that Mr. Cooper may have lost the opportunity to earn in the area of \$2,671.310

This analysis does not take into account sales made at the Steve Harvey website or through the Steve Harvey fan club.

¹<http://www.dupeshop.com/pricing/duplication-pricing-reg-dvd-cases.htm>

7. ADDITIONAL CONSIDERATIONS

7.1) Economics is the social science that seeks to describe the factors that determine the production, distribution, and consumption of goods and services. When doing an economic evaluation, it is necessary to utilize accepted procedures and sources that are deemed reliable per the techniques of the economics profession.

7.2) One premise of an economic evaluation of benchmarks is to be able to compare things that are similar, and possibly interchangeable. In this report, even though it was released in 2008, I believe that Mr. Harvey's video *Still Trippin'* is the best comparable product with the videotapes owned by Mr. Cooper.

7.3) In applying sales numbers from 2008 to the contested year (2014), I came across considerable changes in Mr. Harvey's popularity since the release of *Still Trippin'*. Relying on the information provided in the Wikipedia.org article on Mr. Harvey, I noted that Mr. Harvey had not yet begun his presence on television in the year 2008. Since then, he has become the host of *Family Feud*, the *Celebrity Family Feud*, and the *Steve Harvey Television Show*. He has also hosted a number of prominent award ceremonies. I have not been able to quantify the value of this considerable expansion in Mr. Harvey's national popularity.

7.4) Since 2008, Mr. Harvey has won the following awards and honors:

- 2011: BET Humanitarian Award - 2011 BET Awards
- 2013: Favorite New Talk Show Host - 39th People's Choice Awards
- 2013: Star on the Hollywood Walk of Fame
- Two-time winner: NAACP Image Awards Outstanding News/Talk/Info Series (as host of Steve Harvey - 2014, 2015)
- 2014: Daytime Emmy Award for Outstanding Game Show Host
- 2014: Daytime Emmy Award for Outstanding Talk Show Informative (as host of Steve Harvey)
- 2015: East 112th Street in Cleveland renamed Steve Harvey Way
- 2015: NAACP Image Awards Outstanding Host - Talk/Reality/Variety/News/Information
- 2015: Daytime Emmy Award for Outstanding Talk Show Informative (as host of Steve Harvey)

7.5) Mr. Harvey has also written a New York Times bestseller, *Act Like a Lady, Think Like a Man*, which has been made into two successful movies, *Think Like a Man* and *Think Like a Man Too*.

7.6) I believe that these factors establish a growing popularity of Steve Harvey in the national consciousness, and a reason for people to become more interested in buying his material. Harvey's growing popularity then presents additional reasons to expect that projections in

Section 6, which are established through techniques and data confined to my expertise as an economist, may be deemed somewhat low.

7.7) Public information regarding Mr. Harvey's finances and the sales of products associated with him has been scarce. I have been advised the Mr. Cooper has requested information from Mr. Harvey that is more reliable but not publicly available. When that information is provided, I reserve the right to revise my estimate of valuation to reflect the reality of Mr. Harvey's situation.

7.8) I am also advised that the Court may consider these additional factors when entering its final judgment. I will advise of additional personal documents of Mr. Harvey's that should be disclosed prior to this moment.

8. CONCLUSION

The above report represents my expert opinion and the conclusions to which I am prepared to testify in court. I am advised that prejudgment interest and discount adjustments may be fixed by the Court. I am advised that, per the Court's order, I will have an opportunity to supplement this report to update financial information related to Plaintiffs' damages and Defendants' expenses not previously included in my reports. I reserve the right to modify my results as full information becomes available for this and other data updates prior to trial.

Michael A. Einhorn /s/

Michael A. Einhorn, Ph.D.

July 10, 2015

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSEPH COOPER, §
§
Plaintiff, §
v. § CAUSE NUMBER: 3:14-cv-04152-B
§
BRODERICK STEVEN "STEVE" HARVEY §
§
Defendant. §

**DEFENDANT'S FRCP RULE 30
NOTICE OF DEPOSITION, DUCES TECUM, OF MICHAEL EINHORN**

PLEASE TAKE NOTICE that Defendant Broderick Steven "Steve" Harvey will take the oral deposition of Michael Einhorn, pursuant to Federal Rules of Civil Procedure 30, before an officer qualified to take the deposition. The deposition will be videotaped.

Said deposition will be taken on **November 9, 2015, beginning at 10:00 a.m.** at BENNETT, WESTON, LAJONE & TURNER, P.C., Attorneys and Counselors at Law, 1603 LBJ Freeway, Suite 280, Dallas, TX 75234, and will continue day to day until completed.

DUCES TECUM. PLEASE TAKE NOTICE FURTHER that the witness is hereby requested to produce at, or prior to, this deposition the items requested on Exhibit "B" attached hereto.

Defendant asks this entire notice be provided to the witness upon your receipt of it.

Respectfully Submitted,



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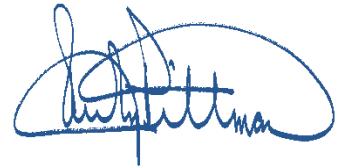
Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served upon Plaintiff's counsel in accordance with the Federal Rules of Civil Procedure on the 4th day of November 2015 as follows:

J. Michael Weston
Bennett, Weston, et al
1603 LBJ Freeway
Suite 280
Dallas, TX 75234

Via Hand Delivery
 Via CMRRR
 Via Telecopy [214-373-6810]
 Via Regular U.S. Mail
 Via Overnight Courier
 Via Email



AUBREY "NICK" PITTMAN

“EXHIBIT A”

DEFINITIONS

These Requests incorporate, without limiting the scope of the Federal Rules of Civil Procedure, the following definitions:

1. “Plaintiff” shall mean and refer to Plaintiff Joseph Cooper, Close Up Video Productions, and all owners, board members, officers, employees, and/or other persons acting or purporting to act on behalf of Joseph Cooper and Close Up Video Productions.
2. “Defendant” shall mean and refer to Steve Harvey and all persons whom you believe were acting on behalf of Defendant.
3. “YOUR,” and “YOU,” shall mean and refer to Michael Einhorn, and all owners, board members, officers, employees, and/or other persons acting or purporting to act on behalf of Michael Einhorn.
4. “Lawsuit” and “Complaint” refers to all claims, cross-claims, counterclaims and defenses, whether now asserted or asserted hereafter by amendment, supplement or otherwise, of the parties in the above-styled and numbered cause.
5. “Identity,” “Identify,” and “Identification:”
 - A. As to a Person: When used in reference to a person or individual, these terms mean to state his or her full name, address, place of employment, if known, and telephone number.
 - B. As to an Entity: When used in reference to an entity such as a corporation, partnership or association, these terms mean to state the name of the entity, its business address, telephone number, and name of the entity’s chief executive officer and the agent for service of process.

C. As to a Document: When used in reference to a document, these terms mean to state the following:

- i. The title, heading or caption of the document;
- ii. The date appearing on such document; or if no date appears, the approximate date on which the document was prepared;
- iii. A general description of the document;
- iv. The name of the person who signed the document or a statement that it was unsigned;
- v. Name of the person or persons who prepared the document;
- vi. Name of the persons to whom the documents was addressed and to whom the document was sent; and
- vii. The physical location of the document.

6. “Document” means any writing and any other tangible thing in YOUR custody, possession or control, whether printed, recorded, reproduced by any process, or written or contained in a computer (mainframe or otherwise) or on a computer disc, tape, software or electronic media of any kind or data compilation or produced by hand. Set forth below is a list of examples of writings and tangible things which are included within this definition. The list is not an exclusive list of the writings and tangible things included within this definition, but rather are intended to aid you in producing the documents that are requested. Examples of writings and tangible things included within the definition of “document” are as follows:

Letters; e-mails; texts; tweets; electronically stored information; faxes; reports; agreements; intracompany and intercompany communications; correspondence; telegrams; memoranda; summaries or records of conversations; diaries; calendars; photographs; tape recordings; models; charts; plans; drawings; agendas; minutes or records of conferences or meetings; expressions or statements of policy; lists of persons attending meetings or conferences; summaries; investigations; opinions or reports of consultants; appraisals; records; brochures; pamphlets; advertisements; circulars; trade letters; reports, summaries or analyses prepared by or for any governmental entity or agency; press releases; drafts of any documents; revisions of drafts of any documents; canceled checks; bank statements; invoices; receipts; and notes.

7. “Communication” or “communications” means any contact or act by which any information, knowledge or dialogue is transmitted or conveyed and shall include, without limitation, written contact by such means as letters, memoranda, e-mails, “instant messages,” tweets, texts, telegrams, telex, or by any document, as well as oral contact by such means as face-to-face meetings and telephone conversations.

8. The words “or,” “and,” “all,” “every,” “any,” “each,” “one or more,” including,” and similar words of guidance are intended merely as such and should not be construed as words of limitation. The words “or” and “and” shall include each other whenever possible to expand, not restrict, the scope of the request. The word “including” shall not limit any general category or description that precedes it. The words “all,” “every,” “any,” “each,” and “one or more” shall include each other, when appropriate, to expand, not restrict, the scope of the Request.

9. The words “refer to,” “relate to,” “reflect” or “concern” a given subject means concerning, referring to, alluding to, responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, mentioning, reflecting, analyzing, constituting, evidencing, identifying or in any way pertinent to that certain subject.

10. The word “person” means any natural person or any business, legal or governmental entity or association, including, but not limited to, private and public partnerships, associations, corporations, joint ventures, sole proprietorships, firms, and governments.

11. The use of the singular form of any word includes the plural and vice versa.

12. These requests seek disclosure to the full extent of the Federal Rules of Civil Procedure and applicable laws and shall be interpreted as inclusive rather than exclusive.

EXHIBIT "B"

Please produce all documents, communications, and items requested below that are within your possession, custody or control:

1. All documents, notes, ESI and communications that reflect the process, formulas, and/or calculations you used to determine the damages you believe to be proper in this matter.
2. All publications that you have authored or co-authored within the last ten (10) years.
3. All articles, papers, etc. that you have written or co-written on the subjects of damages calculations, accounting, forensics, or economics that have been peer-reviewed.
4. A list of (a) any and all suits (by title, court and number) in which you were deposed or testified as to matters in the field of your expertise during the past four (4) years and (b) the attorneys who engaged you in each suit.
5. Up to four textbooks, course books, seminar papers, articles, surveys, or other written composition, if any, that best reflect the methodology you employed in rendering your opinions in this matter.
6. Up to four textbooks, course books, seminar papers, articles, surveys, or other written composition, if any, that best reflect the methodology used in the industry to calculate damages in lawsuits.
7. All books, standards, treatises or studies that were relied upon or referred to in conducting your analysis, calculations and conclusions in this case.
8. Any and all correspondence, e-mails, text messages, communications, memoranda, notes, ESI, charts, graphics, photographs, reports, documents, materials and/or notes of communications between you and your representatives and any other expert regarding in any way this lawsuit, your work performed in connection with this lawsuit, and/or any facts related in any way to the subject matter of this lawsuit.
9. Any and all documents and communications that identify facts or data that attorneys for Joseph Cooper provided to you that you considered in forming the opinions to be expressed.
10. All documents and communications that reflect, in whole or in part, any information or assumptions, provided to you by Cooper or by any of attorneys for Cooper in this matter for the purpose of you considering, and relying upon same, in arriving at your opinion(s) in this case.

11. Any and all documentary, demonstrative or other tangible evidence, including photographs, charts, presentations, software, hardware, drawings, models, reports or other documents, demonstrative aids or tangible things, that you may use at trial to explain or support your testimony.
12. Any and all documents that relate to or reveal any bias or potential bias of you in relation to the claims, the parties, the subject matter of this lawsuit and/or any of your opinions or analyses in connection with this case.
13. Any and all documents, communications, and things constituting, relating or referring to any proposal, solicitation, offer or proposition put forward either by you or attorneys for Cooper that in any way concerns your retention or employment in this action or retention of you by Cooper or his counsel.
14. Any and all documents reflecting the terms of your employment and/or the compensation paid or to be paid to you in connection with your involvement in this lawsuit, including, but not limited to, employment contracts or agreements, engagement letters, bills, statements, invoices, time records, acknowledgments, comments, reminders, observations, explanations or notations, log sheets and accounting summaries of amounts billed and/or paid and copies of checks received in connection with this lawsuit.
15. All statements or invoices prepared by you or on your behalf covering any of your services in connection with the present action.
16. All documents prepared by you at the request of or on behalf of Plaintiff or his attorneys.
17. All documents prepared by Plaintiff and/or his attorneys that you reviewed and relied on in reaching your opinions and conclusions.
18. All documents, including, but not limited to, reports prepared by you that discuss, refer or relate to this lawsuit in any way.
19. All notes that discuss, refer or relate to any oral communication between you and Plaintiff or his attorneys.
20. All files maintained by you related to your analysis and investigation in this case.
21. Any and all photographs, videotapes, drawings, diagrams, charts, demonstrative aids, ESI, and other documents that form a basis for any of your opinions in this lawsuit.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOSEPH COOPER, Plaintiff,	vs	
VS	vs	CAUSE NUMBER: 3:14-cv-04152-B
BRODERICK STEVEN "STEVE" HARVEY, Defendant.	vs	

ORAL AND VIDEOTAPED DEPOSITION OF
MICHAEL ALLAN EINHORN, Ph.D.

NOVEMBER 20, 2015

16 ORAL AND VIDEOTAPED DEPOSITION OF MICHAEL
17 ALLAN EINHORN, Ph.D., produced as a witness at the
18 instance of the DEFENDANT, and duly sworn, was taken in
19 the above-styled and numbered cause on the 20th day of
20 November, 2015, from 10:19 a.m. to 1:22 p.m., before
21 TINA TERRELL BURNEY, CSR in and for the State of Texas,
22 reported by machine shorthand, at the offices of
23 Bennett, Weston, LaJone & Turner, P.C., 1603 LBJ
24 Freeway, Suite 280, Dallas, Texas 75234, pursuant to the
25 Federal Rules of Civil Procedure.

1 A P P E A R A N C E S
2

3 FOR THE PLAINTIFF:

4 Mr. J. Michael Weston
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10 FOR THE DEFENDANT:

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23 ALSO PRESENT:

24 Mr. Luis Acevedo (Videographer)

25

1 P R O C E E D I N G S

2 THE VIDEOGRAPHER: We're on the record
3 for the deposition of Michael Allan Einhorn. The time
4 is 10:19 a.m. on November 20th, 2015.

5 Will the court reporter administer the
6 oath?

7 (Witness sworn.)

8 MICHAEL ALLAN EINHORN, Ph.D.,
9 having been first duly sworn, testified as follows:

10 EXAMINATION

11 BY MR. PITTMAN:

12 Q. Sir, what's your full name?

13 A. Michael Allan Einhorn.

14 Q. And what's your business address?

15 A. 3 Nob Hill, Roseland, New Jersey.

16 Q. And what's your home address?

17 A. Same.

18 Q. What do you do for a living?

19 A. I'm an economist.

20 Q. Where are you employed?

21 A. I'm employed -- I'm self-employed.

22 Q. What's your educational background since high
23 school?

24 A. I went to Dartmouth. I have a Bachelor of
25 Arts. I have a Ph.D. from Yale.

Is your self-employment by way of a sole proprietor, a corporation, a partnership or what?

A. A sole proprietorship.

Q. Do you have any employees?

A. No.

Q. Have you ever worked with this law firm before, the law firm that's representing Mr. Cooper?

A. No.

Q. Sir, what do you perceive as your purpose and function in this case?

A. Estimating the damages resulting from tortious interference with rights that Mr. Cooper had to distribute and market videotapes of Steve Harvey's performances.

Q. You're not here to testify as an expert as to whether a contract was breached, correct?

A. Correct.

Q. You're not here to testify as to whether a contract was tortiously interfered with, correct?

A. Correct.

Q. Who retained you in this case?

A. Mr. Weston.

Q. Did Mr. Weston tell you how he came about you?

A. No.

Q. Did you ask?

1 to you by Mr. Weston, correct?

2 A. Some documents, yes.

3 Q. Did you rely on any of those documents in
4 forming your opinions in this case?

5 A. Yes.

6 Q. Which documents did you rely on?

7 A. Well, Mr. Weston came up with the awareness of
8 the Nash Information Services, which provides the -- is
9 a marketing service that provides data on estimated DVD
10 sales, and through that awareness, I was able to contact
11 Nash Information Services and get some data from them,
12 and then understand from them their methodology and what
13 they try to do in ways that I agree with and ways that I
14 don't.

15 Q. Had you ever worked with Nash Information
16 Services before?

17 A. No.

18 Q. Had you ever heard of them before?

19 A. No.

20 Q. Have you done any type of economic analysis or
21 damages analysis in the TV business?

22 A. Yes.

23 Q. How about the radio business?

24 A. Yes.

25 Q. How about the movie business?

1 methodology, that would be improper, wouldn't it, for an
2 expert?

3 A. It would be improper to conceptualize the
4 matter in two different ways, correct.

5 Q. Item 5 on Exhibit 2 asks for textbooks, course
6 books, seminar papers or other written composition that
7 best reflects the methodology you employed in rendering
8 your opinions in this matter. Do you have any of those?

9 A. I don't have any textbooks that will -- that I
10 can point to immediately. I've come across the concepts
11 of this methodology through reading court cases and
12 other expert reports, and I'm aware of what's used in
13 the business.

14 Q. So if the court wanted to know of a textbook
15 or course book or seminar paper that reflects the
16 methodology you used, you would not be able to identify
17 one for the court; is that correct?

18 A. I would not be able at this point to identify
19 one for the court.

20 Q. Well, at what other point would you be able
21 to?

22 A. Well, if I were asked the question, I would go
23 head and troll through my memory and troll through the
24 Internet and Google and search and find a list of papers
25 that would accommodate the general approach.

1 Q. Well, did you not understand that Exhibit
2 Number 2, the Notice of Deposition Duces Tecum, was for
3 that very purpose, for you to do that so that you could
4 identify those? Did you not understand that?

5 MR. WESTON: I'll object to the question.

6 A. I'm sorry, which point are we --

7 Q. Number 5.

8 MR. WESTON: And I'll object to the
9 question as a matter of form.

10 A. What I interpreted that to mean was that of
11 any of these textbooks or course books that I could
12 recall that reflected the methodology at hand. In the
13 course of my career, I have become aware of these --
14 this method and these conceptualizations used over and
15 over again, but off the top of my head, I could not
16 immediately recall which one would meet up to the exact
17 standards.

18 Q. My question was: Did you not understand that
19 this request was asking for you to do that?

20 MR. WESTON: Objection.

21 A. I did not understand the full implication.

22 Q. Okay. So you have no book, paper, article or
23 any kind of written composition that you can show us
24 that reflects the methodology that you used in this
25 case; is that correct?

1 A. From my memory, correct.

2 Q. Well, you don't have any paper that can show
3 that either, do you, sir?

4 MR. WESTON: Objection, form.

5 A. I did not refer to my immediate source in
6 using this methodology, as I had seen this in the course
7 of doing my professional work over many, many years as
8 an expert.

9 MR. PITTMAN: Objection, nonresponsive.

10 Q. That wasn't my question. Let me ask you: Are
11 you aware that when a court looks at an expert, a court
12 looks to see whether the expert uses a methodology that
13 is accepted by experts in the field? Are you aware of
14 that?

15 A. Correct.

16 Q. So my question to you is: Can you show the
17 court any documentation that reflects the methodology
18 that you used?

19 MR. WESTON: Objection, form.

20 A. I'm having a difficult time understanding
21 this.

22 Q. It's very simple. Let me ask it -- let me ask
23 it two ways. Do you believe you used a methodology
24 that's accepted by experts in the field in doing the
25 work you did in this case?

1 A. I do.

2 Q. Okay. Now, do you believe that that
3 methodology is reflected in some paper or documentation
4 that other experts prepared or used?

5 A. I do.

6 Q. And you can't identify any of those; is that
7 right?

8 A. I cannot at this moment recall exactly papers
9 and reports that I can source in a professional citation
10 manner that would accommodate that last request.

11 Q. Item 7 asks for all books, standards,
12 treatises, studies you relied on or referred to in
13 conducting your analysis, calculations and conclusions.
14 Did you bring anything?

15 A. No.

16 Q. Item 11 asks for all documents and
17 communications that would reflect any information or
18 assumptions provided to you by Cooper or his attorneys.

19 A. I was asked to assume that Mr. Cooper's
20 ability to release or to market his DVDs was stopped in
21 the year 2008 by Mr. Harvey.

22 Q. Do you have any -- did you bring any written
23 email or letters or documentation that reflects the
24 assumptions they told you to make?

25 A. No.

1 A. Correct.

2 Q. And you did call Nash, didn't you?

3 A. I did.

4 (Exhibit 8 marked.)

5 MR. PITTMAN: Unfortunately, I only have
6 two copies of this one. If you want to look at this, I
7 only have two copies.

8 MR. WESTON: Do you want to take a minute
9 and let me get another copy made?

10 MR. PITTMAN: Well, let me ask about this
11 and then we can.

12 MR. WESTON: Okay. I'd like to see
13 what's going on.

14 MR. PITTMAN: These are documents you
15 produced yesterday, by the way.

16 Q. Let me ask you to take a look at Exhibit 8.
17 You see on the first page it says "Draft," correct?

18 A. Correct.

19 Q. Then you see starting on the second page
20 there's a number of inserts that have a red line?

21 A. Correct.

22 Q. Do you see that?

23 A. Correct.

24 Q. Whose language is this?

25 A. This is Mr. Weston suggesting possible -- I'm

1 sorry -- yes, Mr. Weston suggesting possible changes in
2 a word where I could be more factually correct or more
3 concise, better writing, more thorough.

4 Q. So on Exhibit 8, Mr. Weston, Mr. Cooper's
5 attorney, has taken your report, and he's gone through,
6 and on Page 2 he has made some substantial edits to it,
7 hasn't he?

8 A. He has -- yes. He has made some -- offered
9 some ideas.

10 Q. Well, these are ideas that you accepted?

11 A. I accepted, yes.

12 MR. WESTON: Let's take a quick break so
13 I can make a copy of that. All I need to do is hand it
14 to her.

15 THE VIDEOGRAPHER: Off the record at
16 11:38.

17 (Recess.)

18 THE VIDEOGRAPHER: We're on the record.

19 The time is 11:51.

20 (Exhibit 9 marked.)

21 Q. Let me hand you a copy of what I've marked as
22 Exhibit Number 9. Can you identify Exhibit Number 9?

23 A. I see this.

24 Q. What is it?

25 A. This is a draft of a report that I sent to

1 Mr. Weston.

2 Q. And do you see on Page Number 8 there's a red
3 line section added that's 5.16? Do you see that?

4 A. Yes.

5 Q. Whose language is that?

6 A. Mr. Weston's.

7 Q. So here is another insert that Mr. Cooper's
8 attorney is suggesting that you put into your report,
9 correct?

10 A. Yes.

11 Q. Did you accept that language?

12 A. I did.

13 Q. Was there any language that they submitted
14 that you did not accept?

15 A. Well, let me take a look at the final. I
16 certainly changed the wording of what he offered me in
17 1.2. I accepted his ideas, but I did not accept his
18 language. I did not accept verbatim everything he
19 offered me in 1.3.

20 Q. What did you not accept?

21 A. Well, you can compare 1.3 of the final report
22 with 1.3 of Mr. Weston's draft back to me in his red
23 line.

24 Q. Okay. I'd like for you to do that.

25 A. Okay. Let's see, 1.3 --

1 MR. WESTON: Give the exhibit number as
2 you're referring to it.

3 A. Exhibit 8 is Mr. Weston's red line to me, and
4 Exhibit 6 is my final report. Mr. Weston wrote -- let's
5 see, he wrote, "Steve Harvey is a prominent" -- I wrote,
6 "Steve Harvey is a prominent comedian who is now host of
7 the..."

14 I wrote -- I changed the edit to "host of
15 the Steve Harvey Morning Show, reaching over 60 radio
16 markets." I had an edit change there. "The Steve
17 Harvey Talk Show on television (on television in 50
18 states and the District of Columbia)."

19 I changed that, the wording there. "And
20 is the host of syndicated television shows, Family Feud
21 and Celebrity Family Food." I changed the wording
22 there.

1 Then he said, "Mr. Harvey's television
2 career started with Showtime at the Apollo. I didn't
3 use that at all. Then he wrote, "When he closed the
4 Steve Harvey Comedy Club in 1994, Mr. Harvey starred in
5 a television show named Me and the Boys." I didn't use
6 that at all.

7 Then I finished up with "Prior to his
8 committing to a prime time audience, Mr. Harvey
9 performed at a number of adult comedy clubs throughout
10 the U.S. and released a DVD, Still Trippin', as late as
11 2008.

12 So he offered some ideas, but I
13 considered them and then I worded them more to my
14 liking. I didn't just take Mr. Weston's wording
15 verbatim. I never do.

16 Q. Well, you took -- you took -- you took all of
17 his language, except you made a few stylistic changes.
18 The only thing you didn't accept was the reference to
19 the Apollo and Me and the Boys, correct?

20 A. And I made stylistic changes to the rest of
21 his language, yes.

22 Q. Correct. You didn't change the substance.
23 You just changed -- maybe he didn't have the proper
24 sentence structure.

25 A. I'll accept that -- I'll accept that I

1 accepted the substance. I thought these were good
2 ideas.

3 Q. Let me hand you now a copy of what I have
4 marked as Exhibit 10.

5 (Exhibit 10 marked.)

6 MR. WESTON: Do you have a copy for me?

7 MR. PITTMAN: Again, I don't know why she
8 didn't make copies of them. This is the stuff you gave
9 me yesterday, but I told her to make four copies, and I
10 got two.

11 MR. WESTON: Okay.

12 MR. PITTMAN: I think there's just one
13 more. I think the rest of them are fine.

14 MR. WESTON: Okay. When we hit that one
15 more, let me get my copies of them.

16 Q. Exhibit 10 is another copy of a draft,
17 correct?

18 A. Correct.

19 Q. And in Exhibit 10, you have just taken the
20 location of the information that Mr. Weston gave you
21 earlier and put it in a different location, correct, if
22 you would turn to Page 8 and Page 10?

23 A. Yes.

24 Q. So you're keeping the language that Mr. Weston
25 gave you for your report, you're just putting it in a

1 different section of your report, correct?

2 A. Correct.

3 (Exhibit 11 marked.)

4 Q. Let me hand you a copy --

5 A. One second, please. No. Let me correct
6 something here. 5. -- if you go to Exhibit 6 and go to
7 Paragraph 5.16 --

8 Q. Well, no. I'm on Exhibit 10. My question is
9 as it relates to Exhibit 10.

10 A. I'm sorry, Exhibit 10.

11 Q. Exhibit 10, you're taking the language that
12 Mr. Weston gave you --

13 A. No, I made a mistake.

14 Q. Okay. Let me ask my question. If you look at
15 Page 8, we discussed earlier that this is information
16 that Mr. Weston provided to you, correct?

17 A. I made a mistake.

18 Q. You made a mistake on what?

19 A. This information I originally wrote in 5.16.
20 The information on Exhibit 10 that appears in Paragraph
21 5.16 is originally my writing, and it says there that I
22 relied upon information provided in a wikipedia.org
23 article on Mr. Harvey.

24 Q. Well, let me ask you -- let me let you look at
25 this other exhibit, and then you tell me what's true and

1 what's not. Let me -- I'm handing you a copy of what I
2 have marked as Exhibit 11. Do you see Exhibit 11? It's
3 an email between you and Mr. Cooper's lawyers, correct?

4 A. Yes.

5 Q. And you see -- starting at the bottom of Page
6 2, you see where on July 9th, 2015 at 2:40, you tell
7 Mr. Weston that you have "basically accepted all your
8 changes." Do you see that?

9 A. Okay.

10 Q. So Mr. Weston provided some changes to you,
11 and you told him the day before the report was due that
12 you basically accepted all of Mr. Cooper's attorneys'
13 changes, correct?

14 A. Okay.

15 Q. And then Mr. Weston writes back to you at 4:04
16 p.m. -- I'm not sure if that's Eastern Time or Central
17 Time -- but he writes back to you and asks you to look
18 at Page -- look at Paragraph 5.16 on the attached,
19 correct?

20 A. Correct.

21 Q. Does that refresh your recollection that 5.16
22 was Mr. Weston's writing?

23 A. (No response.)

24 Q. And then look at the message right above that
25 where you say, "try this," and "a new shot at Section

1 7." Does that reflect that you moved 5.16 to Section 7?

2 A. Yeah. That looks -- yeah, that looks right.

3 That looks like Mr. Weston's writing.

4 Q. And also on Page 11 -- I'm sorry, on Exhibit
5 11, look at the first page. Mr. Weston is telling you
6 that -- his word is -- I'm sorry, his phrasing is, "I am
7 thinking of something like this placed at an early point
8 in the report."

9 Do you see that?

10 A. Yes, I do.

11 Q. So that's Mr. Weston telling you what you
12 should place in the report, correct?

13 A. Not what I should place, what I should
14 consider.

15 Q. And do you see where it talks about the nature
16 of the economic review -- or nature of economic review?

17 A. I see three paragraphs there.

18 Q. Right. And do you see where it says -- in
19 Paragraph 1.1, for instance, the second sentence, it
20 says "In this report, even though it released in 2008,
21 it is assumed that Mr. Harvey's video, Still Trippin',
22 is fungible with the videotapes owned by Mr. Cooper."

23 Do you see that?

24 A. Yes.

25 Q. Now, that's Mr. Cooper's attorneys writing

1 that language, correct?

2 A. Correct.

3 Q. And the last sentence said, "When that
4 information is provided, we will revise our estimate of
5 valuation to reflect the reality of Mr. Harvey's
6 situation," correct?

7 A. Correct.

8 Q. And that is coming from Mr. Cooper's
9 attorneys, correct?

10 A. Correct.

11 Q. And do you see further on 1.12 it says, "In
12 the area of entertainment, significant factors that may
13 impact on economic performance cannot be measured to the
14 required for use and economic rejection."

15 Do you see that?

16 A. I do.

17 Q. And that language comes from Mr. Cooper's
18 attorneys, correct?

19 A. Correct.

20 Q. Can you look at your expert report and tell
21 the jury how much of that information that came from
22 Mr. Cooper's attorneys was included in your report?

23 MR. WESTON: You're referring to Exhibit
24 11?

25 MR. PITTMAN: Exhibit 11, how much of

1 that found its way into the final report that's Exhibit
2 6.

3 A. I took 1.10 and modified the thoughts to read
4 something that I was more comfortable with, and I
5 included that as 7.1. I took 1.11 and used about half
6 of it, and then removed the remainder, and then included
7 that as 7.2.

8 I took 1.12, and I don't see where I used
9 that at all. So I considered Mr. Weston's ideas, and I
10 am -- have used some of them when I felt comfortable
11 using them.

12 Q. Well, here, for instance, it says -- on
13 Exhibit 11 it says, "When doing an economic evaluation,
14 it is necessary to utilize accepted procedures and
15 sources that are deemed reliable."

16 Do you see that?

17 A. Yes.

18 Q. And you used that information, correct?

19 A. Yes. Mr. Weston is an attorney.

20 Q. Well, sir, my question is simply whether --
21 well, let me ask you this. Do you know whether
22 Mr. Weston has an economic background?

23 A. No. I have an economics background.

24 Q. Do you know whether he has one?

25 A. No. I presume that he doesn't.

1 Q. And the 1.11 on Exhibit 11, the language that
2 comes from Mr. Cooper's attorneys, one premise of an
3 economic evaluation is to be able to compare things that
4 are fungible, mutually interchangeable."

5 Do you see that?

6 A. Yes.

7 Q. The only change you made was you changed the
8 word "fungible" to "that are similar and possibly
9 interchangeable."

10 Do you see that?

11 A. Yes.

12 Q. You accepted the idea and the premise that
13 Mr. Cooper's attorney provided to you, didn't you?

14 A. I think the word similar and the word fungible
15 mean two different things. So I accepted the -- when
16 Mr. Weston offered an idea, I considered it. If I liked
17 it, I put it in. And as more often is the case, I
18 edited it to an area where I felt it was suitable.

19 Mr. Weston offered ideas on this draft.

20 Q. And this is without you having any knowledge
21 of what Mr. Weston's experience was in economics or
22 damages evaluation or comedic performances or a
23 copyright damages estimation?

24 A. If he made sense, I took it, and if he didn't
25 make sense, I didn't. And if he made sense and it

1 needed a modification, we did that.

2 MR. PITTMAN: Objection --

3 A. I judged the thoughts just as an entirely
4 enclosed capsule and reviewed them ab initio, regardless
5 of any understanding I had of Mr. Weston's background.

6 MR. PITTMAN: Okay. Objection,
7 nonresponsive.

8 Q. My question is: You accepted input from
9 Mr. Weston without knowing whether he had any background
10 in the kind of expertise that was needed here, correct?

11 A. Correct.

12 Q. And, sir, did you ever tell Mr. Weston, "Look,
13 I am the economic expert here, you stay with the law and
14 let me handle the economic evaluation"? Did you ever
15 tell him that?

16 A. I did that when I modified his words.

17 Q. Sir, that wasn't my question. Did you ever
18 tell him -- because we've seen now at least five
19 instances where Mr. Weston was providing information to
20 you for your report. Did you at any point tell him that
21 you don't feel comfortable accepting input from a lawyer
22 when this was something that required an economic
23 evaluation? Did you ever tell him that?

24 A. I did feel comfortable hearing his ideas.

25 Q. Did you tell him that this was something that

1 he should allow you, the expert, to do and not rely on
2 the lawyer? Yes or no.

3 A. No.

4 Q. Sir, how much work did you do on your report,
5 I mean actual work from whether it's drafting, whether
6 it's calculation, whether it's analysis? I want you to
7 tell the jury how much work. Just sum up the work that
8 you did yourself.

9 A. Well, I was hired -- the purpose of my
10 engagement here was principally to estimate the damages,
11 damages owing from the suppressed sales from
12 Mr. Harvey's presumed tortious interference.

13 And if you go here, how much work did I
14 do, I went in and I dealt with materials in Section 5
15 and Section 6 concerning Mr. Harvey's sales, the
16 comparable of Still Trippin', how much Still Trippin'
17 sold. I dealt with information from Nash Information
18 Services, and I dealt with a construction of the lost
19 sales of Mr. Harvey, and then I took that construction
20 of lost sales from Mr. Harvey or from Mr. Cooper and
21 turned it into a dollar -- a dollar figure based on
22 revenues and costs and resulting profits.

23 So basically I'd say I was hired to do
24 damages, and I estimated those damages in my own
25 opinion, and Mr. Weston did not say, "Could you please

1 try to benchmark sales from any other DVDs that had
2 15-year-old material to determine -- to assess what the
3 sales would have been?

4 A. No.

5 Q. Do you know what company produced and
6 distributed the 2008 video, Still Trippin'?

7 A. No, I do not.

8 Q. Now, let's talk about --

9 A. I'm sorry. I'm sorry. If I can see the
10 original complaint, this information was provided to me.

11 Q. What information was provided?

12 A. Of who that -- who that distributor was.

13 Q. I'm asking do you know who it was.

14 A. I do not recall. It's in the complaint.

15 Q. Okay. And if it's not in the complaint, you
16 don't know? In other words, you didn't do any
17 independent investigation yourself --

18 A. I did not do any independent investigation.

19 Q. You know that you could have gone -- you could
20 have Googled it to find out. You know that, correct?

21 A. Sure.

22 Q. But you didn't Google it to find out who
23 produced that 2008 video?

24 A. No.

25 Q. In Paragraph 5.10 and 5.11, just so we're

1 clear, you did not go through any kind of independent
2 process yourself to determine the ranks and pricing
3 information for that benchmark product that you used,
4 correct?

5 A. This was provided by Nash.

6 MR. PITTMAN: Objection, nonresponsive.

7 Q. You did not personally do it yourself,
8 correct?

9 A. No.

10 Q. So the information that's in Item 5.10 and
11 5.11 and 5.12, you did not personally research and
12 compile this information, correct?

13 A. Correct.

14 Q. So this is actually not your work?

15 A. This is work from Nash.

16 Q. So it's not your work, correct?

17 A. Correct.

18 (Exhibit 13 marked.)

19 Q. Let me hand you a copy of what I've marked as
20 Einhorn Exhibit 13. Do you recognize Exhibit 13?

21 A. Correct.

22 Q. What is it?

23 A. It's an email from Bruce Nash to me.

24 Q. So just so that we're clear, Exhibit 13 is a
25 document that was provided to you by a third party, a

1 gentleman by the name of Bruce Nash, correct?

2 A. Correct.

3 Q. And it's information that you relied on in
4 forming the opinions in your report, correct?

5 A. Correct.

6 Q. In fact, you have even gone so far as to take
7 language from Mr. Nash's email that's Exhibit 13 and put
8 it into your report, correct?

9 A. I did take some language, yes.

10 Q. And, again, this is Mr. Nash's language, not
11 yours?

12 A. Correct.

13 Q. And Mr. Nash is someone you'd never used
14 before, correct?

15 A. Correct.

16 Q. Did you do any kind of research into
17 Mr. Nash's background?

18 A. I understand that he runs a company called
19 numbers.com which provides video information.

20 MR. PITTMAN: Objection, nonresponsive.

21 Q. Did you personally do any research into
22 Mr. Nash's background?

23 A. No.

24 Q. Do you know whether Mr. Nash has ever
25 testified in court?

1 A. No.

2 Q. Do you know whether Mr. Nash has ever been
3 accepted as an expert by any court?

4 A. No.

5 Q. Did you do anything, any independent research
6 yourself, to verify any of the information that Mr. Nash
7 supplied to you for inclusion in your report?

8 A. I did an independent analysis.

9 Q. I said investigation of the numbers that
10 Mr. Nash provided to you to use in your report.

11 A. I used the numbers that Mr. Nash provided in
12 5.11.

13 MR. PITTMAN: Objection, nonresponsive.

14 Q. My question is: Did you do any independent
15 research to verify the numbers that he provided to you?

16 A. No.

17 Q. Now, on Page 7 of your report, these numbers
18 that you have listed here, starting with the date of
19 November 13th, 2008 through September 14th, 2014, these
20 are numbers that you lifted directly from the
21 information that this third party provided to you,
22 correct?

23 A. Correct.

24 Q. And in 5.12, you see where you say, "From very
25 limited information, I estimated that Amazon accounts

1 A. No.

2 Q. You didn't make any adjustment for that, did
3 you?

4 A. No.

5 Q. So you didn't -- in other words, you didn't
6 take into account whether any other products that
7 Mr. Harvey had in the marketplace would have
8 cannibalized the release of this 20-year-old material,
9 did you?

10 A. No. There was -- well, no.

11 Q. Now let's look at Page 8 of your report,
12 Exhibit 6. Now, in Item 6.1, you are assuming here that
13 this contract with Music Video Distributors would have
14 been entered into, correct?

15 A. Correct.

16 Q. Did you ask anyone from Music Video
17 Distributors whether the contract had been entered into?

18 A. Well, no, because my understanding is
19 Mr. Harvey stopped it from being entered into.

20 MR. PITTMAN: Objection, nonresponsive.

21 A. No, I did not.

22 Q. Okay. You did not ask anyone from Music Video
23 Distributors whether this contract would have been
24 entered into, correct?

25 A. Correct.

1 Q. Did Mr. Cooper or Mr. Weston tell you that the
2 chief operations officer of Music Video Distributors had
3 some reservations about this contract or entering into
4 this contract even before he had any conversation with
5 Mr. Harvey's lawyer?

6 A. No.

7 Q. So if this contract was not a definite
8 contract for reasons unrelated to Mr. Harvey, it would
9 not be appropriate to use this contract to assess
10 damages, correct?

11 A. If that were true, yes.

12 Q. "Yes," that's correct?

13 A. Correct.

14 Q. Let me hand you a copy of what was previously
15 marked as Defendant's Exhibit 39. Is this a copy of the
16 contract you used to make your assessment of damages?

17 A. Correct.

18 Q. And, again, did you review this contract in
19 detail?

20 A. Yes.

21 Q. Did you look at -- turn to Page 2 of this
22 contract and look under Item 6-A.

23 A. (Witness complies.)

24 Q. Can you read that?

25 A. "Distributor shall have the right to utilize

1 not more than three minutes or one complete song as
2 performed in the film, whichever is longer, for
3 broadcast promotion use only."

4 Q. Does this relate to the video? Are you aware
5 that there were no songs in the video?

6 A. Well, it doesn't say at the top of the
7 contract who Music Video Distributors entered into the
8 contract with.

9 Q. Correct.

10 A. So I am not aware what the -- this is the
11 contract that Music Video Distributors established with
12 somebody, and I used this contract for Mr. Cooper.

13 MR. PITTMAN: Okay. Objection,
14 nonresponsive.

15 Q. Are you aware that there were no songs in the
16 Cooper videos?

17 A. I'm not aware.

18 Q. And, again, if this contract was not agreed
19 upon, absent any involvement from Mr. Harvey, then your
20 numbers are irrelevant, correct?

21 A. If this contract were not a -- by legal
22 definition, if -- this is for the judge to determine. I
23 can't answer that. That's a legal -- a legal
24 determination, but if it's determined that this contract
25 was not suitably entered into, then that's the end of

1 that's Exhibit 39 was not going to be entered into, then
2 your calculations are not proper, correct?

3 A. I would want to show if the contract could be
4 used as a suitable representation with common practice,
5 but, no, not immediately.

6 Q. So you're talking about another report. In
7 other words, you would have to go out and look at some
8 other contracts in the marketplace, wouldn't you, sir?

9 A. If this contract were not valid, there would
10 have to be another -- another analysis.

11 Q. And you didn't do that analysis, did you?

12 A. I used only this contract.

13 Q. And you also used a suggested retail price of
14 14.95 and a wholesale price of 8.25, didn't you?

15 A. Correct.

16 Q. Did you do any analysis to see whether this
17 20-year-old material could sell for the wholesale price
18 of 8.25?

19 A. No. I adopted this contract as to what it
20 said.

21 Q. Look at Page -- again, we're on your report
22 that's Exhibit 6. Look at Page 8. On Page 8 you say
23 that, "as I believe that the distribution contract
24 implicated in total a collection of five DVDs that were
25 derived from Mr. Cooper's videotapes."

1 Do you see that?

2 A. What paragraph, please?

3 Q. 6.8.

4 A. Okay.

5 Q. Do you see that?

6 A. Correct.

7 Q. Who told you that?

8 A. Mr. -- Mr. Weston.

9 Q. But you saw the contract yourself, didn't you?

10 A. I believe that there was a possibility of
11 five -- five DVDs in total.

12 Q. Do you see that in the contract?

13 A. No.

14 Q. Okay. So you just relied on Mr. Cooper's
15 attorney?

16 A. Correct.

17 Q. You didn't ask anyone from Music Video
18 Distributors whether they would have done five DVDs, did
19 you?

20 A. No, I did not contact Music Video.

21 Q. You didn't make any assessment as to whether,
22 even if they were -- the first video wasn't successful,
23 whether the second, third, fourth and fifth would have
24 been released, did you?

25 A. No, I did not.

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF TEXAS
3 DALLAS DIVISION

4 JOSEPH COOPER, §
5 Plaintiff, §
6 VS § CAUSE NUMBER:
7 BRODERICK STEVEN § 3:14-cv-04152-B
8 "STEVE" HARVEY, §
9 Defendant. §

10 REPORTER'S CERTIFICATION

11 ORAL AND VIDEOTAPED DEPOSITION OF
12 MICHAEL ALLAN EINHORN, Ph.D.

13 NOVEMBER 20, 2015

14 I, Tina Terrell Burney, Certified Shorthand
15 Reporter in and for the State of Texas, hereby certify
16 to the following:

17 That the witness, MICHAEL ALLAN EINHORN,
18 Ph.D., was duly sworn by the officer and that the
19 transcript of the oral deposition is a true record of
20 the testimony given by the witness;

21 I further certify that pursuant to FRCP Rule
22 30(f)(1) that the signature of the deponent:

23 xx was requested by the deponent or a
24 party before the completion of the deposition and is to
25 be returned within 30 days from date of receipt of the
 transcript. If returned, the attached Changes and

117

1 Signature Page contains any changes and the reasons
2 therefor;

3 _____ was not requested by the deponent or a
4 party before the completion of the deposition.

5 I further certify that I am neither attorney
6 or counsel for, nor related to or employed by, any of
7 the parties or attorneys to the action in which this
8 deposition was taken. Further, I am not a relative or
9 employee of any attorney of record in this case, nor am
10 I financially interested in the outcome of the action.

11 Subscribed and sworn to on this the 24th
12 day of November, 2015.

13
14 

TINA TERRELL BURNET Texas CSR # 2908

15 Expiration Date: 12/31/16

16 DepoTexas - Firm Registration No. 459

17 Sunbelt Reporting - Firm Registration No. 301

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214-373-4977

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Page 1

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

- - -

JOSEPH COOPER :
:
v. : Case No. 3:14-cv-04152-B
:
BRODERICK STEVEN "STEVE" :
HARVEY :
:
- - -

Tuesday, November 3, 2015

- - -

Deposition of EDWARD SEAMAN, taken at the

offices of MVD Entertainment Group, 203 Windsor Road,

Pottstown, Pennsylvania 19464, on the above date,

beginning at 2:00 p.m., before Brad Tratenberg, Court

Reporter and Notary Public.

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Page 2

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1 MR. ERICK: This is under the federal
2 rules. So everyone will agree to use that.
3 Beyond that, I don't believe there are any
4 additional agreements.

5 - - -

8 BY MR. ERICK:

9 Q Please state your name for the record.

10 A Ed Seaman.

11 Q Hi, Mr. Seaman. My name is Casey Erick and I
12 represent the plaintiff, Mr. Joseph Cooper, in this
13 lawsuit against Steve Harvey. Do you understand who I
14 am and who I represent?

15 A I do.

16 Q I want to ask some background questions about
17 you, beginning with your current position at Music Video
18 Distributors. What is your title at the company?

19 A I am the COO and the general manager.

20 Q Just generally, what are some of your
21 responsibilities?

22 A Overseeing the staff, looking out for products
23 acquisition, content. I do the business and legal
24 affairs. I oversee the finances. I run the operation.

Page 18

1 Q Any other examples that you thought of at the
2 time when you were evaluating this proposal with Mr.
3 Cooper?

4 A No, not off the top of my head.

5 Q Now, after this proposed agreement, after you
6 sent the proposed agreement to Mr. Cooper, did you have
7 a conversation with or did Mr. Harvey's attorney contact
8 you?

9 A There was --

10 MR. GOLLAND: Just answer yes or no,
11 Ed.

12 THE WITNESS: I'm trying to understand
13 the question. I remember that something in
14 the -- I think when we got to the point of
15 doing an advance, I asked for Mr. Cooper's
16 proof of the content and ownership. And I
17 don't know that I felt great about what I saw
18 in that proof of ownership. And I asked my
19 attorney to take a look.

20 MR. GOLLAND: Ed, he just asked you if
21 Mr. Harvey's attorney talked to you.

22 THE WITNESS: I'm sorry.

23 MR. GOLLAND: The question was just did
24 you have a conversation with Mr. Harvey's

Page 19

1 attorney during that period?

2 THE WITNESS: No, I did not.

3 BY MR. ERICK:

4 Q At any point, did Mr. Steve Harvey's attorneys

5 contact you about the proposed agreement with Mr.

6 Cooper?

7 A Not to me, no.

8 Q Did Mr. Harvey's attorney contact your

9 attorney?

10 A I don't think they contacted my attorney, no.

11 Q Did anybody communicate from your company to

12 Steve Harvey's attorneys?

13 A Not from my company, no.

14 Q From what company?

15 A From Michael Golland. And our attorney
16 contacted their attorney.

17 Q I'm sorry. When I said "you," I'm referring to
18 your company, not personally. I mean the company's
19 attorney, Mr. Golland.

20 A Okay. Then yes.

21 Q I need to clarify. Mr. Harvey's attorneys
22 contacted Music Video Distributors' attorney at the
23 time, Mr. Michael Golland, correct?

24 MR. GOLLAND: I think the distinction

Page 20

1 is they didn't contact Music Video
2 Distributors. Music Video Distributors through
3 my office contacted Mr. Harvey's attorney. So
4 I think that's where the distinction is.

5 THE WITNESS: Correct.

6 BY MR. ERICK:

7 Q Mr. Seaman, it's your understanding that your
8 attorney, or the company's attorney rather, contacted
9 Mr. Harvey's attorney? True?

10 A Correct.

11 Q Now, why did your attorney contact Mr. Harvey's
12 attorney?

13 MR. GOLLAND: Objection. That calls
14 for him to potentially divulge our
15 communication, which would be privileged.

16 MR. ERICK: All right.

17 BY MR. ERICK:

18 Q Let's try this: I believe you mentioned that
19 you were uncomfortable with proof of ownership or words
20 to that effect. Was there something that you saw or
21 heard that made you inquire as to the company's attorney
22 about that issue?

23 A Yes. I mean, it's going back a little and I
24 haven't looked at the information again since this

Page 21

1 occurred. But what I saw in terms of Mr. Cooper's
2 paperwork did not seem rock solid to me.

3 Q And what paperwork are you referring to?

4 A It was some paperwork between Mr. Cooper and
5 Mr. Harvey for him recording the performance and
6 something about -- and I don't remember what
7 specifically but something gave me pause in terms of,
8 you know, the claimed ownership.

9 Q Did you ever discuss the lawsuit that Mr.
10 Harvey filed against Joseph Cooper regarding that
11 agreement and enforcing that agreement?

12 A With whom?

13 MR. GOLLAND: Discuss with whom?

14 MR. ERICK: Let me strike that.

15 BY MR. ERICK:

16 Q Did you ever discuss the lawsuit that Mr.
17 Harvey filed against Mr. Cooper based on that agreement,
18 based on that contract?

19 MR. GOLLAND: Well, again, I'm going to
20 object. Discuss with whom?

21 MR. ERICK: I'm sorry.

22 BY MR. ERICK:

23 Q Did you discuss it with Mr. Cooper?

24 A No, I don't think so.

Page 23

1 A You know, as far as common practice, I would
2 think so. I would think that anybody in this business
3 that wants to protect themselves makes sure that when
4 somebody says they own something, they really do, yes.

5 Q Did you ever receive a cease and desist letter
6 from Mr. Harvey's attorneys?

7 A No.

8 Q Did your attorney contact Mr. Harvey's
9 attorneys?

10 A Yes.

11 Q And what did your attorney relate to you about
12 that conversation?

13 MR. GOLLAND: Obviously he can't answer
14 that. That's privileged.

15 BY MR. ERICK:

16 Q Was the reason that was given to you by the
17 company's counsel or was the conversation with the
18 company's counsel the reason why MVD did not move
19 forward with the contract or agreement with Mr. Cooper?

20 MR. PITTMAN: Objection, form.

21 THE WITNESS: It was definitely a
22 contributing factor.

23 BY MR. ERICK:

24 Q Had that conversation not occurred, would the

Page 24

1 company have gone forward with the agreement with Mr.
2 Cooper to market and distribute that footage?

3 MR. PITTMAN: Objection, form.

4 THE WITNESS: It's hard to say. I
5 can't really answer that fairly. I know that I
6 didn't feel good about things. So, you know,
7 typically if I don't feel good about something,
8 I don't do it. So I can't answer that question
9 fairly.

10 BY MR. ERICK:

11 Q You would not send a proposed contract to
12 someone that you did not intend on having an agreement
13 with, is that fair?

14 MR. PITTMAN: Objection, form.

15 THE WITNESS: I hadn't seen his alleged
16 ownership when I sent that proposal. So you
17 can do with that information as you wish.

18 BY MR. ERICK:

19 Q What, if anything, did you hear or were you
20 told by Mr. Harvey's attorneys that --

21 MR. GOLLAND: He's not going to reveal
22 communications between him and me.

23 BY MR. ERICK:

24 Q Are you aware, Mr. Seaman, if Mr. Harvey's

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1 multiple usages. And an invoice, that sounds like it
2 could be correct.

3 Q And I believe you said you've been in this
4 business over 20 years?

5 A Yes.

6 Q You're able to make an assessment whether
7 there's something that gives a person a clear right to
8 do what he's asking you to do?

9 A Yes.

10 Q And when Mr. Cooper approached you, did he
11 actually send you one of the videos he had or did he
12 send you a snippet? You don't recall?

13 A I just don't remember. I'm sure I saw
14 something. I think the footage was older. I think the
15 quality wasn't great. I'm almost sure it was standard
16 def and not high def. But I don't recall if it was the
17 whole thing or partial.

18 Q And your recollection is that Mr. Cooper sent
19 you something, you were uncomfortable with it and you
20 sent it, you promptly sent it to your attorney to have
21 your attorney look at it?

22 A Please repeat that for me.

23 Q Mr. Cooper presented something to you where he
24 said, this evidences my ownership. You were

Page 31

1 uncomfortable with it, so you presented it to your
2 attorney?

3 A Correct.

4 Q And that's sort of your standard process, if
5 you have questions about whether you have a right,
6 whether your company has a right to distribute
7 something?

8 A Truthfully, most things I handle on my own.

9 And I wasn't sure about this one. It didn't seem right.

10 So I sent it to our attorney.

11 Q Now, when Mr. Cooper presented to you with this
12 opportunity, did you or anyone from your company look at
13 his financials to see what kind of business --

14 A No.

15 Q So you have no idea about his financial
16 situation?

17 A No.

18 Q And you had no idea about whether he had any
19 marketing or sales ability to assist in this project?

20 A I didn't anticipate any marketing support.

21 From what I recall, I felt that that would need to come
22 from us, that I recall.

23 Q Your company did not present a budget to Mr.
24 Cooper, did it?

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C E R T I F I C A T I O N

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the proceedings held in this matter, as transcribed from the stenographic notes taken by me on November 3, 2015.

BRAD TRATENBERG

Court Reporter - Notary Public

(This certification does not apply to any reproduction of this transcript, unless under the direct supervision of the certifying reporter.)